

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of the Application of

Air Virginia, Inc.

(Assignor)

and

Clear Channel Radio Licenses, Inc.

(Assignee)

For Consent to the Assignment of the License of
WUMX(FM), Charlottesville, VA

File No. BALH-20000403ABI

MM Docket No. 02-38

HEARING DESIGNATION ORDER

Adopted: February 14, 2002

Released: March 19, 2002

By the Commission: Chairman Powell and Commissioners Abernathy, Copps and Martin issuing separate statements.

1. The Commission has before it the above-captioned application for the assignment of the license for station WUMX(FM), Charlottesville, Virginia from Air Virginia, Inc. ("Air Virginia") to Clear Channel Radio Licenses, Inc., a wholly owned subsidiary of Clear Channel Communications, Inc. ("Clear Channel") (File No. BALH-20000403ABI). Because this application was pending when we adopted the Notice of Proposed Rulemaking in MM Docket No. 01-317 ("*Local Radio Ownership NPRM*"), we consider the competitive concerns raised by this application pursuant to the interim policy adopted in that notice.¹ As discussed more fully below, we cannot find on this record that grant of this application is consistent with the public interest. Accordingly, pursuant to Section 309(e) of the Communications Act of 1934, as amended, we hereby designate the application for hearing.

¹ See *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861, 19894-97 ¶¶ 84-89 (2001).

I. INTRODUCTION

2. For much of its history, the Commission has sought to promote diversity and competition in broadcasting by limiting the number of radio stations a single party could own or acquire in a local market.² In March 1996, the Commission relaxed the numerical station limits in its local radio ownership rule in accordance with Congress's directive in Section 202(b) of the Telecommunications Act of 1996. Since then, the Commission has granted thousands of assignment and transfer of control applications proposing transactions that complied with the new limits. In certain instances, however, the Commission has received applications proposing transactions that would comply with the new limits, but that nevertheless could produce concentration levels that raised significant concerns about the potential impact on the public interest.

3. In response to these concerns, the Commission concluded that it has "an independent obligation to consider whether a proposed pattern of radio ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local radio market and[,] thus, would be inconsistent with the public interest."³ In August 1998, the Commission also began "flagging" public notices of radio station transactions that, based on an initial analysis by the staff, proposed a level of local radio concentration that implicated the Commission's public interest concerns.⁴

4. On November 8, 2001, we adopted the *Local Radio Ownership NPRM*. We expressed concern that "our current policies on local radio ownership [did] not adequately reflect current industry conditions" and had "led to unfortunate delays" in the processing of assignment and transfer applications.⁵ Accordingly, we adopted the *Local Radio Ownership NPRM* "to undertake a comprehensive examination of our rules and policies concerning local radio ownership" and to "develop a new framework that will be more responsive to current marketplace realities while continuing to address our core public interest concerns of promoting diversity and competition."⁶ In the *NPRM*, we requested comment about possible interpretations of the statutory framework, including whether the new numerical station ownership limits definitively addressed the permissible levels of radio station ownership, whether they addressed diversity concerns only, or whether they established rebuttable presumptions of ownership levels that were consistent with the public interest. We also requested comment on how we should define and apply our traditional goals of promoting diversity and competition in the modern media environment. The *NPRM* also sought comment on how we should implement our policies toward local radio ownership.

² See generally *id.* at 19862-70 ¶¶ 3-18.

³ *CHET-5 Broadcasting, L.P.*, Memorandum Opinion and Order, 14 FCC Rcd 13041, 13043 ¶ 8 (1999) (citing 47 U.S.C. § 309(a) and *KLXK, Inc.*, 13 FCC Rcd 15685 (1998)). See also *Shareholders of Citicasters, Inc.*, Memorandum Opinion and Order, 11 FCC Rcd 19135, 19141-43 ¶¶ 12-16 (1996).

⁴ See Public Notice, Broadcast Applications, Rep. No. 24303 (Aug. 12, 1998). Under this policy, the Commission flagged proposed transactions that would result in one entity controlling 50 percent or more of the advertising revenues in the relevant Arbitron radio market or two entities controlling 70 percent or more of the advertising revenues in that market. See *AMFM, Inc.*, 15 FCC Rcd 16062, 16066 ¶ 7 n.10 (2000).

⁵ *Local Radio Ownership NPRM*, 16 FCC Rcd at 19870 ¶ 19.

⁶ *Id.*

5. In the *Local Radio Ownership NPRM*, we also set forth an interim policy to “guide [our] actions on radio assignment and transfer of control applications pending a decision in this proceeding.”⁷ Although we recognized the need to “handle currently pending radio assignment and transfer applications and to address any future applications filed” while the *NPRM* is pending, we disavowed any intent to prejudge the “ultimate decision” in the rulemaking and rejected any “fundamental” changes to our current policy pending completion of the rulemaking.⁸

6. Under our interim policy, “we presume that an application that falls below the [50/70] screen will not raise competition concerns” unless a petition to deny raising competitive issues is filed. For applications identified by the 50/70 screen, the interim policy directs the Commission’s staff to “conduct a public interest analysis,” including “an independent preliminary competitive analysis,” and sets forth generic areas of inquiry for this purpose.⁹ The interim policy also sets forth timetables for staff recommendations to the Commission for the disposition of cases that may raise competitive concerns.

II. BACKGROUND

7. Clear Channel and Air Virginia filed an application proposing to assign the license of station WUMX(FM) from Air Virginia, Inc. to Clear Channel on April 30, 2000. Eure Communications (“Eure”) filed a petition to deny on May 26, 2000, alleging that the transaction would have anti-competitive effects on local advertisers in the local radio market. Clear Channel and Air Virginia filed oppositions to the petition to deny and Eure replied. Clear Channel currently owns five stations in the Charlottesville metro: WVAO-FM, Crozet, Virginia; WCYK-FM, Staunton, Virginia; WVSF(FM), Ruckersville, Virginia; WKAV(AM), and WCHV(AM), Charlottesville, Virginia.

8. In its Petition to Deny, Eure alleges that the proposed transaction would have anti-competitive effects on local advertisers in the Charlottesville metro. Specifically, Eure claims that based on BIA’s 1999 revenue data,¹⁰ Clear Channel’s local advertising revenue share, as a result of the acquisition, would increase from 30.8% to 53.6%, and Clear Channel’s post-merger share combined with Eure’s own share in the market, would be 94.2%. In addition, Eure argues that the proposed transaction would eliminate a competitor in the market, reducing the voices in the market from seven to six. Other than the stations owned by Eure and Clear Channel, Eure claims that there is only one other station in the market, WUVA(FM), that generates any revenue share. Clear Channel’s dominance is also clear, according to Eure, when audience demographic shares are examined. Eure claims that Clear Channel’s average local commercial audience share for fall 1999 would increase from 35.7 to 45.7, constituting excessive market concentration. Finally, Eure argues that the proposed level of increase in concentration is inconsistent with antitrust principles and is unacceptable under what it asserts is the Department of Justice’s (“DOJ”) primary indicator of market concentration. In opposition, Clear Channel argues that Eure has offered no concrete allegations as to how the proposed transaction would harm competition or how it would impose a barrier to Eure’s ability to compete in the market.

⁷ *Id.* at 19894 ¶ 84.

⁸ *Id.*

⁹ *Id.* at 19895 ¶ 86.

¹⁰ BIA is a communications and information technology investment banking, consulting, and research firm. BIA provides strategic funding, consulting and financial services to the telecommunications, Internet, and media/entertainment industries.

9. On November 15, 2001, the staff sent a letter requesting additional information from the parties to facilitate the competition analysis.¹¹ Clear Channel responded to the letter on December 5, 2001, and Eure filed comments on December 19, 2001. We designate the application for hearing based on this record.

III. DISCUSSION

A. Framework for Analysis Under Interim Policy

10. Section 310(d) of the Communications Act of 1934, as amended (the “Communications Act”) requires the Commission to find that the public interest, convenience and necessity would be served by the assignment of Air Virginia’s radio broadcast license to Clear Channel before that assignment may occur.¹² Under the interim policy set forth in our *Local Radio Ownership NPRM*, we conduct a public interest analysis, including but not limited to an independent preliminary competition analysis of the proposed transaction based on publicly available information and information in the Commission’s records.¹³

11. Under the interim policy, to decide whether a proposed assignment serves the public interest, we first determine whether it complies with the specific provisions of the Communications Act, other applicable statutes, and the Commission’s rules, including our local radio ownership rules. If it does, we then consider any potential public interest harms of the proposed transaction as well as any potential public interest benefits to determine whether, on balance, the assignment serves the public interest.¹⁴

12. The Commission’s analysis of public interest benefits and harms includes an analysis of the potential competitive effects of the transaction, as informed by traditional antitrust principles. While an antitrust analysis, such as that undertaken by the Department of Justice or the Federal Trade Commission, focuses solely on whether the effect of a proposed merger “may be substantially to lessen competition” in the advertising market,¹⁵ our focus is different.¹⁶ Our analysis of radio license assignments is informed by

¹¹ Letter (November 15, 2001) from Mass Media Bureau to Clear Channel, Air Virginia, and Eure requesting information be provided for the record to fully assess the transaction for its effects on the public interest.

¹² 47 U.S.C. § 310(d).

¹³ *Local Radio Ownership NPRM*, 16 FCC Rcd. at 19895-96 ¶ 86.

¹⁴ *Id.* at 19895 ¶ 85; see *VoiceStream Wireless Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 9779, 9789 ¶ 17 (2001); see also *Chet-5 Broadcasting, L.P.*, 14 FCC at 13043 ¶ 8 (holding that the Commission has “an independent obligation to consider whether a proposed pattern of radio station ownership that complies with the local radio ownership limits would otherwise have an adverse competitive effect in a particular local market and thus would be inconsistent with the public interest”).

¹⁵ 15 U.S.C. § 18.

¹⁶ Although the Commission’s analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed by them, which allows the Commission to arrive at a different assessment of likely competitive benefits or harms than antitrust agencies may find based solely on antitrust laws. See *FCC v. RCA Communications*, 346 U.S. 86, 96-97 (1953) (“To restrict the Commission’s action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure.”). See also *RCA Communications*, 346 U.S. at 94; *United States v. FCC*, 653 F.2d 72, 81-82 (D.C. Cir. 1980) (*en banc*) (The Commission’s “determination about the proper (continued....)

how those antitrust experts look at competition issues, yet our authority arises out of the Communications Act, which is not concerned solely with the potential impact of economic concentration on advertisers, but ultimately seeks to maximize the utility that the public derives from the public airwaves. The Commission's public interest evaluation is therefore not limited to competition concerns but necessarily encompasses the "broad aims of the Communications Act."¹⁷ These broad aims include, among other things, ensuring the existence of an efficient, nationwide radio communications service, available to everyone and promoting locally oriented service and diversity in media voices.¹⁸ Our public interest analysis therefore includes assessing whether the transfer will affect the quality of radio services or responsiveness to the local needs of the community,¹⁹ and whether it will result in the provision of new or additional services to listeners.²⁰

13. Thus, under our interim policy, where a proposed transaction raises concerns about economic concentration, we will consider evidence that the particular circumstances of a case may mitigate any adverse impact to radio listeners that might otherwise result, as well as any evidence of benefits to radio listeners that might result from the proposed transaction. Ultimately, it is the potential impact of the transaction on listeners that will determine whether we can find that, on balance, grant of a particular radio station assignment or transfer of control application serves the public interest.

B. Local Radio Ownership Rules

14. The Commission's local radio ownership rules restrict the number of radio stations in the same service and the number of stations overall that may be commonly owned in any given local radio market.²¹ A local radio market is defined by the area encompassed by the mutually overlapping principal community contours of the stations proposed to be commonly owned.²² Under the rules, as amended by the Telecommunications Act of 1996, in a local radio market with 45 or more commercial radio stations,

(Continued from previous page) _____

role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry."); *Teleprompter-Group W*, 87 FCC 2d 531 (1981), *aff'd on recon.*, 89 FCC 2d 417 (1982) (Commission independently reviewed the competitive effects of a proposed merger); *Equipment Distributors' Coalition, Inc. v. FCC*, 824 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agency to "analyze proposed mergers under the same standards that the Department of Justice . . . must apply.").

¹⁷ See *AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3168-69 ¶ 14 (1999); *WorldCom, Inc.*, Memorandum Opinion & Order, 13 FCC Rcd 18025, 18030-31 ¶ 9 (1998) ("*WorldCom-MCI Order*").

¹⁸ For example, the Supreme Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices: it has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)).

¹⁹ See *Deregulation of Radio*, Report and Order, 84 FCC 2d 968, 994-97 (1981); *Sixth Report and Order*, Docket No. 8736, 1 RR 91:559, :624 (1952).

²⁰ See, e.g., *WorldCom-MCI Order*, 13 FCC Rcd at 18030-31 ¶ 9.

²¹ 47 C.F.R. § 73.3555(a).

²² *Id.*; see *Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, 11 FCC Rcd 12368 (1996).

a single entity may own up to eight commercial radio stations, no more than five of which are in the same service; in a market with 30 to 44 commercial radio stations, one owner may hold up to seven commercial radio stations, no more than four of which are in the same service; in a market with 15 to 29 stations, a single owner may own up to six stations, no more than four of which are in the same service; and in a market with 14 or fewer stations, one owner may hold up to five stations, no more than three of which are in the same service, except that no single entity may control more than 50% of the stations in such a market.²³

15. We find that Clear Channel's proposed acquisition of WUMX(FM) is consistent with the numerical limits in our radio local ownership rules.²⁴ Clear Channel's multiple ownership showing indicates that using the Commission's current definition of "radio market," the transaction creates one radio market,²⁵ which comprises 29 radio stations. A single licensee may, therefore, own up to six stations, not more than four of which are in the same service (AM or FM). If the proposed transaction were to be approved and consummated, Clear Channel would own six stations (2 AM/4 FM) in the market, which is within the numerical limits set forth in the multiple ownership rules.

C. Public Interest Analysis Under Interim Policy

16. Having concluded that the proposed transaction is consistent with the numerical limits set forth in our ownership rules, our interim guidelines instruct us now to turn to our competition analysis. Here, we find that the proposed transaction would create a market in which the combined market share of the top two group owners in the market would be 94.2%. Unlike other transactions we have considered, we find that Clear Channel has failed to demonstrate particular circumstances in this market sufficient to overcome a concern that this level of economic concentration in this market will harm the public interest. Rather, Clear Channel has presented only generic arguments challenging the parameters of our current competition analysis. Because we will be addressing such concerns in the context of the *Local Radio Ownership NPRM*, we will not consider them here. Rather, we look only to the record of this case to determine whether there are unique facts that persuade us that grant of this transfer application would serve the public interest despite the apparent economic concentration it will create. We are unable to conclude on this record that the public interest would be served by a grant of this application. Accordingly, under Section 309(e), we must designate this matter for hearing.

17. In order to set the stage for the hearing in this case, we lay out below the specific market conditions that lead to our conclusion that the level of economic concentration in this market in the wake of this transaction would be contrary to the public interest. We recognize that Clear Channel may elect not to go to hearing, but wait until the conclusion of the rulemaking proceeding where we will consider the generic arguments it has presented.

18. *Radio Advertising as the Relevant Product Market.* Pursuant to our interim policy, we presume that the relevant product market is radio advertising. However, we consider evidence from the parties that the relevant product market in a specific case includes other forms of media advertising or should be based on listenership rather than advertising. Clear Channel asserts that radio advertising is not

²³ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), §202(b)(1); 47 C.F.R. § 73.3555(a)(1).

²⁴ 47 C.F.R. § 73.3555(a).

²⁵ See *Definition of Radio Markets*, Notice of Proposed Rule Making, 15 FCC Rcd 25077 (2000).

the relevant product market; that there is no radio-advertising customer in Charlottesville that does not have an economical option to radio advertising; and that the Commission has not properly taken inter-media competition into account from newspapers, television stations, cable operators and other local media outlets.²⁶ However, Clear Channel provides no data to support its assertion that the relevant product market is broader than radio advertising in the Charlottesville market. Accordingly, for purposes of this order we continue to assume that radio advertising is the relevant product market.

19. *The Arbitron Metro as the Relevant Geographic Market.* Pursuant to our interim policy, we presume that the relevant geographic market is the Arbitron metro. However, we consider evidence from the parties that the relevant geographic market in a specific case may be larger, smaller, or otherwise different from the Arbitron metro. Clear Channel asserts that “Arbitron market areas are arbitrarily drawn and do not accurately reflect the geographic areas in which Clear Channel’s stations compete for advertising revenue.”²⁷ However, Clear Channel offers no alternative geographic market definition. In contrast, Eure maintains that almost 100% of its advertising revenue is derived from businesses operating in Charlottesville, that it “does not sell to businesses based outside the Charlottesville market unless the advertiser wishes to reach residents in the Charlottesville area,” and that “stations from outside the market do not sell advertising in Charlottesville.”²⁸ Moreover, our staff’s preliminary analysis of city grade contours is consistent with the three-county area defined by Arbitron as the Charlottesville metro. While Clear Channel argues that the Arbitron metro should not be presumed to be the reliable geographic market, Mr. Mitchell (station manager of Air Virginia) and Mr. Kestenbaum (market manager, Central Virginia region, for Clear Channel) refer to Arbitron, the Charlottesville radio market, and a small market such as Charlottesville when describing competition. Under all these circumstances, we find no persuasive reason to vary from the Arbitron metro.

20. *Market Participants.* Current BIA data show 16 in-market stations, four of which are university-owned and operate on channels reserved for noncommercial use, in the Charlottesville metro. One of the 12 commercial stations is operated by students at the University of Virginia. BIA also identifies 15 out-of-market stations, which together receive approximately 11 percent of listening for the Charlottesville metro. Clear Channel owns six of the out-of-market stations. Clear Channel argues there is a “plethora of radio stations that can and do sell advertising in the Charlottesville market,” that one of its stations (WCYK-FM) is not in the Charlottesville metro, and that non-commercial radio stations achieve large ratings and are “sold aggressively on the street.”²⁹ Eure contends that non-commercial stations are not in the business of selling commercial advertising, and argues that WLSA(FM) should not be included in the Charlottesville radio market because the station is physically located outside the Charlottesville metro, shows no ratings in the Arbitron survey, and to Eure’s knowledge does no billing in Charlottesville.³⁰ Our analysis shows that no out-of-market station puts a 70-dbu signal over Charlottesville or half of the metro. While WCYK(FM) is licensed to Staunton, VA and is physically

²⁶ Letter from Malcolm Stevenson to Peter H. Doyle, Chief, Audio Services Division, Mass Media Bureau (Dec. 5, 2001) (“Clear Channel Letter”) at 2.

²⁷ *Id.* at 3.

²⁸ Letter from Gary Smithwick to Peter H. Doyle, Chief, Audio Services Division, Mass Media Bureau (Dec. 19, 2001) (“Eure Letter”) at 4.

²⁹ Clear Channel Letter at 4; Statement of David H. Mitchell at 1.

³⁰ Eure Letter at 4.

located outside the three-county Charlottesville metro, the station is listed by Arbitron in the Charlottesville metro and receives the second highest audience share and the largest revenue share in the Charlottesville metro. We conclude that, excluding WLSA(FM), the in-market stations listed in the Charlottesville metro provide a complete list of stations that compete with one another for radio advertising in the Charlottesville area.

21. *Market Share and Concentration.* Under the interim policy, we presume that BIA revenue share estimates accurately reflect actual market shares. Clear Channel contends market shares continually fluctuate and non-commercial radio stations compete for revenue.³¹ Eure, however, maintains that revenue shares have not fluctuated much at all and that non-commercial radio stations do not compete for revenue. Both Clear Channel and Eure calculate market share estimates based on revenue.³² Clear Channel also calculates market share estimates based on audience, but does not explain why audience share would be a superior metric in this particular matter.

Revenue Share Estimates

| | According to: | |
|---------------|----------------------|-------------------------|
| | Clear Channel (2000) | Eure (using BIA) (2000) |
| Clear Channel | 48.7% (\$3,550,000) | 48.3% |
| WUMX | 12.7% (\$930,000) | 18.3% |
| Eure | 44.5% (\$3,250,000) | 45.6% |
| WUVA | 6.8% (\$500,000) | 6.1% |
| Total | 100% (\$7,300,000) | 100% |

Audience Share Estimates

| | According to: | |
|--------------------------|---------------|----------|
| | Clear Channel | BIA |
| <i>In-market</i> | | |
| Clear Channel | 28.9% | 28.9% |
| WUMX | 4.9% | 4.9% |
| Eure | 23.9%* | 24.1% |
| WUVA | 8.6% | 8.6% |
| Other stations | 0.0%** | |
| Total in-market | 61.4% | 61.6% |
| <i>Out-of-market</i> | | |
| Clear Channel | | 1.8% |
| Piedmont | | 1.9% |
| Radio One | | 2.5% |
| VerStandig | | 1.2% |
| Total out-of-market | 7.3% | 7.4% |
| Ratings unaccounted for: | | 31.0%*** |

³¹ Clear Channel Letter at 4.

³² Eure Letter at 5.

*Clear Channel asserts that Eure stations have superior facilities and are “heritage” stations, i.e., “longtime, recognized market leaders in their mainstream formats with great signals.”

**Clear Channel asserts that one of these stations, WNRN, has a rating among 18-34 year olds of 14.9%.

***Clear Channel asserts that this 31% represents total audience share of non-commercial stations. Arbitron does not rate non-commercial stations.

22. Total revenue shares are not substantially in dispute in this case. Our preliminary competition analysis using the BIA database shows that Clear Channel’s proposed transaction would increase Clear Channel’s advertising market share from 30.0 percent to 48.3 percent, giving it the largest share in the market. The proposed transaction would eliminate a third competitor and essentially create a duopoly market, with the second station group having a share of 45.6 percent and the top two owners having a combined share of 93.9%.

23. The post-merger level of market concentration and the change in concentration resulting from a merger affect the degree to which a merger raises competitive concerns. Market concentration is often measured by the Herfindahl-Hirschman Index (“HHI”). Eure notes that BIA data show that the proposed combination would result in an HHI of 4,451 with a change in the HHI of 1,096. Eure states that in concentrated markets the DOJ presumes that mergers raising the HHI more than 100 points “impermissibly create or enhance market power.” Clear Channel notes that “the HHI is relevant only if the product market, the geographic market and the market participants are accurately identified and the resulting market revenues are accurately captured.”³³ Clear Channel submits that “the HHI is irrelevant to the analysis here because it does not properly identify the market for the purposes of competitive impact analysis.”³⁴ Although we believe that mechanical application of the *Merger Guideline* standards may provide misleading answers to competitive issues in the context of local radio transactions, as a general matter, sufficiently large HHIs establish a *prima facie* case in antitrust suits.³⁵ Our preliminary competition analysis using the BIA database shows that the proposed combination of stations in the relevant geographic market results in an HHI of 4,451 with a change in the HHI of 1096. Clear Channel has failed to present sufficient evidence to rebut the presumption that this HHI describes a highly concentrated market.

24. *Existing Facilities/Barriers to Entry.* Where market share and concentration data suggest the potential for competitive concerns, we examine the number, class, and signal contour of all existing stations in the radio market to determine their competitive significance. We recognize that there may be good AM and FM facilities with low current advertising revenues and our analysis considers the potential for these stations to provide effective competition in the future. In some cases there may be a sufficient number of good facilities remaining outside the largest group’s (or two largest groups’) control to provide a competitive challenge. In the Charlottesville metro, there are four commercial radio stations that would not be controlled by the two largest groups following the proposed transaction: (1) WKTR(AM), Class B; (2) WMRV(FM), Class A; (3) WLSA(FM), Class A; and (4) WUVA(FM), Class A. Based on this record, only one station, WUVA(FM), which is run by students at the University of Virginia, appears to be able to offer any competitive challenge in the future.

³³ Clear Channel Letter at 4-5.

³⁴ *Id.* at 5.

³⁵ *FTC v. Heinz*, 246 F.3d 708, 716 (D.C. Cir. 2001).

25. We also consider evidence regarding the possibility of entry by new stations, as well as any barriers to entry, and the timeliness, likelihood, and sufficiency of entry to counter any potential market power. Clear Channel argues that “the relevant market includes a whole panoply of media outlets such that ease of entry into the radio business alone is by no means the only measure of market entry as a means of offsetting potential adverse competitive effects.”³⁶ Clear Channel states that one AM facility (810 kHz, Crozet) appears available for operation. Clear Channel contends that it is possible for other radio stations to increase market share through better management and format changes and negate any market power which Clear Channel may hold. Eure states that “It would be virtually impossible for another entity to enter the Charlottesville market.” Eure contends that no one will enter the market using 810 kHz; the license for the Crozet station was surrendered to the FCC and the tower site sold; the Crozet station was a daytime facility; and the FCC no longer issues daytime only licenses. Eure believes the Crozet station terminated operations because it could no longer compete in the market. We are unable to find on this record that entry by new radio stations is a realistic possibility in the Charlottesville area.

26. *Potential Adverse Competitive Effects: Unilateral Effects and Coordinated Effects.* Under the interim policy, relevant evidence concerning the potential adverse competitive effects of a proposed transaction may include direct proof of adverse competitive effects or facts that demonstrate that structural conditions (e.g., a high market share and significant barriers to entry) will facilitate the exercise of market power. In evaluating the potential adverse competitive effects of a proposed transaction, under the interim policy, we also consider the effect on competition, if any, that may have resulted from a pre-existing LMA, TBA, or JSA between the applicants. Clear Channel asserts that there is no evidence of coordinated behavior between Clear Channel and other market competitors. According to Clear Channel, coordinated interaction would be difficult or impossible to achieve in radio advertising markets “where there are myriad non-public, individualized transactions at prices that fluctuate depending on when the ad time is purchased.” Clear Channel contends that the acquisition of WUMX(FM) will “confirm the experience of operation of WUMX(FM) by Clear Channel under the TBA, which has been an enhancement of competition to the benefit of advertisers and the listening public.” Clear Channel states that “Enhanced competition has resulted in lower advertising rates and increased diversity of program choices for the public.” Eure argues that if advertising rates have decreased, “it is not because of the WUMX(FM) TBA, but because of the year-long slump in demand for advertising that began with the ‘dot com bust’ and was further worsened by the horrific events of September 11.” Eure argues that one evidence of harm is that Clear Channel removed Rush Limbaugh (which is syndicated by affiliate of Clear Channel) from Eure station, which had broadcast the program for 10 years. Eure contends that Clear Channel can effectively block format choices in the market with its market dominance.

27. There is no question here that the proposed transaction would eliminate the major third competitor and create an effective duopoly in the Charlottesville metro. In general, duopolies are conducive to coordinated behavior that facilitates market division and inefficient price discrimination.³⁷ We see no evidence on this record to mitigate our concerns about the potential adverse competitive effects of this transaction.

28. *Efficiencies and Public Interest Benefits.* Under the interim policy, we consider evidence of economic efficiencies that the proposed transaction would produce and public interest benefits the proposed transaction would provide listeners or advertisers, such as improvements in the quality, scope, and quantity of community responsive programming, improved community service, and the furtherance

³⁶ *Id.*

³⁷ See *FTC v. Heinz*, 246 F.3d at 715-16.

of localism. Parties asserting that a proposed transaction will produce efficiencies and other public interest benefits are required to show both how the transaction will produce those benefits and how those benefits will flow through to listeners or advertisers. Clear Channel asserts that various efficiencies under the TBA with WUBX(FM) have resulted in lower advertising rates and increases in format choices for advertisers and the public. Clear Channel contends these efficiencies would not be available if WUMX(FM) operated as a standalone facility. Clear Channel argues that the ability to sell bulk combinations to fewer entities means that individual station rates do not have to be as high to make a profit. According to Clear Channel, WUMX(FM) alone would need to charge \$30 per spot, while bulk purchases across three or more stations would run \$12 - \$15 per spot. Clear Channel argues that stations in cluster groups are able to sell to bulk-buy markets, are included in cluster promotional activities, and enjoy lower operating expenses. Clear Channel also contends that the smaller AM stations are supported by higher billing cluster partners. In addition, Clear Channel maintains that with the TBA with WUMX(FM), both Eure and Clear Channel have sold more inventory at lower rates. Clear Channel asserts that its cluster of stations has provided previously unavailable formats to advertisers. Specifically, a Clear Channel AM station now programs sports and news talk that were previously unavailable in the market.

29. In summary, Clear Channel argues that the transaction will benefit listeners and advertisers through lower advertising rates, expanded buy options for advertisers, the expansion/preservation of format choices, and increased sales of inventory with the result of increased revenue.³⁸ Eure asserts that Clear Channel fails to provide evidence that the TBA has resulted in lower advertising rates.³⁹ Eure contends that Clear Channel has decreased programming choices available to the public.⁴⁰ According to Eure, Clear Channel's WFFX(FM) dropped its Oldies format, the only format of its type in the market to program directly against Eure's WWV(FM) by playing Classic Rock.⁴¹ In addition, Clear Channel's WKAV(AM) formerly broadcast an adult-standard format, but now programs a talk format against Eure's WINA(AM).⁴² Eure asserts that Clear Channel's format changes result in less diversity in programming, not more.⁴³ Clear Channel does not explain why this transaction specifically is needed to support the weaker AM stations, and we note that both of the AM stations have been on the air for more than forty years.

30. To be cognizable, efficiencies must be *transaction specific i.e.*, "efficiencies likely to be accomplished with the proposed transaction and unlikely to be accomplished in the absence of either the proposed transaction or another means having comparable anticompetitive effects." Any claimed efficiencies resulting from a radio transaction should be substantiated and susceptible to verification by the Commission. Efficiencies that are vague, speculative, and unverifiable will not be considered in evaluating the competitive effects of the proposed transaction. We believe that there are material issues as to whether Clear Channel's asserted benefits would result from the transaction and would benefit the

³⁸ *Id.*

³⁹ Eure Letter at 6; Eure Declaration at 2.

⁴⁰ Eure Letter at 6.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

public. We find the record in this proceeding insufficient to conclude that the benefits of this transaction outweigh the potential for competitive harm.

IV. OTHER MATTERS

31. In its petition to deny, Eure also included allegations pertaining to issues other than those relevant to our competition analysis, raising questions about the basic qualifications of the parties to this transaction. We address each of these allegations below.

32. *False Certification.* On the grounds that all of the schedules were omitted from both the Asset Purchase Agreement (“APA”) and the Time Brokerage Agreement (“TBA”) as initially filed with the application, and because the submitted copies of the agreements were unsigned, Eure asserts that Air Virginia and Clear Channel falsely certified that the full and final agreements underlying the assignment application were filed with the Commission. In its opposition, Air Virginia states that both agreements as submitted contain the complete and final understanding between the parties and include all necessary language for a complete review by the Commission. Nonetheless, following its receipt of the petition, Air Virginia filed with the Commission, and served on all parties including Eure, copies of all schedules to the APA and TBA.

33. We have reviewed the agreements, including the schedules thereto, and find that the assignment application, as initially submitted by Air Virginia and Clear Channel, substantially complies with the Commission’s rules and practices with regard to sales application. In this instance, all relevant information regarding the transaction is included in the APA and TBA. Moreover, as noted above, Air Virginia filed the schedules to both of these agreements and served all parties with copies of them. Accordingly, we do not find that Eure has raised a substantial and material question of fact concerning the applicants’ certifications.

34. *Unauthorized Transfer of Control.* Eure also contends that the seven-year TBA, entered into by Air Virginia and Clear Channel simultaneously with the APA, represents an unauthorized transfer of control of WUMX(FM). Specifically, Eure argues that the TBA (1) does not contain an explicit provision giving Air Virginia the right to terminate the agreement without excessive fees or penalties, and (2) Clear Channel is obligated to make an up-front lump-sum payment of 80% of the purchase price prior to obtaining Commission approval. Based on these provisions, Eure concludes that Air Virginia already surrendered control of the station to Clear Channel.

35. To raise a substantial and material question concerning an unauthorized transfer of control, Eure must present evidence to demonstrate that Clear Channel has assumed ultimate control in areas such as the station’s programming, personnel, and finances. *See WGPR, Inc.*, 10 FCC Rcd 8140, 8142 (1995); *Choctaw Broadcasting Corporation*, 12 FCC Rcd 8534, 8543 (1997). A licensee is permitted under Section 310(d) to delegate day-to-day operations relating to those three areas, so long as the licensee continues to set the policies guiding those operations. *See Southwest Texas Public Broadcasting Council*, 85 FCC 2d 713, 715 (1981).

36. Here, the TBA contains an express retention by Air Virginia of ultimate authority over programming, finances and personnel. *See* TBA ¶ 2.1(a)-(f). Air Virginia expressly retains the responsibility to ensure that the overall programming responds to issues of concern to the community of license and also retains the right at anytime to preempt Clear Channel’s programming for emergency programming and for programming which Air Virginia, in its sole discretion, believes to be in the public interest. *Id.* ¶¶ 1.1-1.2. In addition, Air Virginia retains the responsibility under the TBA to hire its own general manager, who shall be responsible for overseeing the operation and programming of the station

and has the sole discretion to make and effectuate all staffing and personnel decisions for the station. *Id.* ¶¶ 1.1 and 2.3.

37. Eure does not allege, nor does the record indicate, any specific conduct by Air Virginia or Clear Channel that would raise questions as to Air Virginia's retention of ultimate control of the station in contradiction of the TBA's express terms. The fact that the TBA provides for penalties for the unilateral termination of the agreement does not mean that Air Virginia is not without recourse to terminate the agreement. Such contractual provisions provide only that the terminating party may be subject to penalties for breach of contract under applicable state law. As for the 80% lump-sum payment, such up-front payments have not been deemed sufficient to demonstrate, in circumstances such as those present here, that an unauthorized transfer of control has taken place. *See WPGR, Inc.*, 10 FCC Rcd at 8145 (no unauthorized transfer of control under an LMA that provided for annual payments of \$1 million over two years, renewable for two more years); *Southwest Texas Public Broadcasting Council*, 85 FCC 2d at 715. Based on the evidence of record in this case, therefore, we do not find that Eure has raised a substantial and material question of fact concerning whether Air Virginia and Clear Channel have engaged in an unauthorized transfer of control.

38. *Strike Petition.* Finally, Eure argues that Air Virginia had filed a bad faith "strike pleading" against an application which sought Commission consent to assign various licenses from Eure to newly formed Charlottesville Communications Corp ("CCC") (the "CCC Applications"). In its petition to deny the CCC Applications, Air Virginia argued that the proposed merger raised significant ownership concentration concerns and stated that the Commission should closely scrutinize the proposal. Eure claims that Air Virginia's proposed sale of WUMX(FM) to Clear Channel is "irreconcilable" with its arguments opposing the CCC Applications, and that the proposed sale is proof that Air Virginia's petition to deny was filed with the intent to delay. Lastly, Eure claims that Air Virginia economically benefited from the delay in the consideration of the CCC Applications, because it gave Air Virginia time to increase WUMX(FM)'s revenues and find a suitable buyer.

39. In opposition, Air Virginia argues that the petition was filed not for the purpose of delaying Commission action, but in order to preserve competition in the Charlottesville radio market. It also denies allegations that it sought economic gain from administrative delays. To the contrary, Air Virginia claims, it was impossible to have expected any Commission delay with respect to the CCC Applications to have a meaningful impact on WUMX(FM)'s revenues. As for the alleged inconsistency between the arguments raised in the petition to deny the CCC Applications and the present sale of WUMX(FM) to Clear Channel, Air Virginia states that although it had no intention of selling WUMX(FM) at the time it filed its petition against the CCC Applications, it was well within its rights to decide subsequently to sell its station to any party entitled to own it pursuant to the Commission's multiple ownership rules.

40. In considering alleged strike pleadings, the Commission considers whether a petitioner has filed a particular pleading for the primary and substantial purpose of delay. *See Radio Carrollton*, 69 FCC 2d 1138, 1150 (1978), *clarified*, 69 FCC 2d 424 (1978), *recon. denied*, 72 FCC 2d 264 (1979), *aff'd sub. nom.*, *Faulkner Radio, Inc. v. FCC*, No. 79-1749 (D.C. Cir. October 15, 1980), *cert. denied*, 450 U.S. 1041 (1981). In determining the primary purpose behind such a pleading, the Commission considers several factors: (1) statements by the petitioner's principals or officers admitting the obstructive purpose; (2) the withholding of information relevant to disposition of the issues raised; (3) the absence of any reasonable basis for the allegations raised in the petition; (4) economic motivation indicating a delaying purpose; and (5) other conduct by the petitioner. *See id.* at 1151-52.

41. Having reviewed Eure's allegations, we find that it has failed to plead sufficient facts to raise a substantial and material question of fact that Air Virginia filed a strike petition against the CCC

Applications. Eure has not alleged that anyone connected with Air Virginia has admitted that its purpose in filing the petition was primarily to obstruct Commission action. Nor has Eure alleged that Air Virginia withheld relevant information in the course of filing its petition with the Commission. As to economic motivation, while it is clear that Air Virginia and Eure are competitors, Eure has not provided substantial evidence establishing that Air Virginia's primary purpose was of delay. The only other "evidence" submitted is the fact that during the pendency of the CCC Applications, Air Virginia filed the subject application to sell WUMX(FM) to Clear Channel. The filing of the WUMX(FM) assignment application, under these circumstances, is insufficient to establish that Air Virginia submitted a strike petition.

V. CONCLUSION

42. On the basis of the information before us, as explained above, we do not find that Eure has provided adequate evidence with respect to its allegations of false certification, unauthorized transfer of control, or the filing of a strike petition, but at the same time we are unable to make the required finding that the public interest, convenience and necessity will be served by granting the captioned application in light of the question(s) raised in the context of our competition analysis. Accordingly, we will designate the assignment application for hearing to determine, pursuant to Section 309(e) of the Communications Act, and based on the evidence to be adduced at hearing, whether the public interest, convenience and necessity will be served by the grant of the application.

VI. ISSUES TO BE DETERMINED AT HEARING

43. Implementing our analytical framework described in the foregoing paragraphs, we direct the Administrative Law Judge ("ALJ") to examine in an evidentiary hearing the particular circumstances of the Charlottesville market to determine whether the factual assumptions in paragraphs 18 through 28 above are correct. We further direct the ALJ to determine, in light of his conclusions, whether the transaction is likely to cause any anticompetitive harms, and to determine what, if any, public benefits would accrue from this transaction. Finally, we direct the ALJ to apply these findings to determine whether, on balance, grant of the application would serve the public interest. The ALJ should address the following specific issues.

44. Issue 1: *Product Market Definition*. Following our analytical framework and the *Merger Guidelines*, the ALJ shall receive testimony, studies, and other relevant economic evidence that allows the determination of the relevant commercial radio product in the Charlottesville metro. In the alternative, parties may stipulate that the relevant product market is "radio advertising," the presumptive product market definition in our analytical framework.

45. Issue 2: *Geographic Market Definition*. Following our analytical framework and the *Merger Guidelines*, the ALJ shall receive testimony, studies, and other relevant economic evidence that allows the determination of the relevant commercial radio geographic market. Arbitron identifies Albemarle, Fluvanna, and Greene Counties and Charlottesville City in Virginia, as comprising the Charlottesville metro. In the alternative, parties may stipulate that the relevant geographic market is the Charlottesville metro.

46. Issue 3: *Market Participants*. Given the findings with respect to Issues 1 and 2, the ALJ shall receive testimony and other relevant economic evidence that identifies all firms that participate in the relevant product and geographic markets. Following the general methodology prescribed in the *Merger Guidelines*, firms not currently producing or selling the relevant product in the relevant geographic market may be included if their inclusion reflects a probable supply response in reaction to a hypothetical increase in the price of the relevant product. Such firms are "uncommitted entrants" and may be induced to enter the relevant product and geographic markets within one year and without the

expenditure of significant sunk costs of entry and exit in response to a small but significant and non-transitory increase in the price of the relevant product. If the parties stipulate that the relevant product and geographic markets are “radio advertising” and the “Arbitron metro,” respectively, then market participants would include all operating commercial radio stations in the Charlottesville metro plus any “dark” stations that might be expected to become operational in response to a small but significant and non-transitory increase in the price of radio advertising.

47. Issue 4: *Market Shares*. The ALJ shall receive testimony or other economic evidence that will facilitate the calculation of market shares for all firms identified as market participants in Issue 3 based on total sales generated within the relevant geographic market for the most recent year for which data are available. If uncommitted entrants may be expected to enter within a year, in response to a small but significant and non-transitory price increase in the relevant product, then such forecast market shares may also be included. In the alternative, parties may stipulate that market shares will be calculated using the most recent revenue data available in the BIA database.

48. Issue 5: *Market Concentration*. The extent of market concentration depends on the number of firms in the market and their respective market shares. Our analytical framework recognizes the Herfindahl-Hirschman Index (“HHI”) as a measure of market concentration but finds that the HHI may not be entirely appropriate when applied to the commercial radio industry. The ALJ shall receive testimony, studies, or other relevant economic evidence to determine the appropriate measure of market concentration in the Charlottesville metro. In the alternative, the parties may stipulate that the market shares developed in the record pursuant to Issue 4 will be taken as the indicator of market concentration.

49. Issue 6: *Potential Adverse Competitive Effects*. Following our analytical framework and the *Merger Guidelines*, the ALJ shall receive testimony, studies and other relevant economic evidence that evaluates the nature and extent of any lessening of competition that might result from the merger in the relevant product and geographic markets. Evidence concerning the potential lessening of competition by (1) coordinated behavior among competing firms and (2) unilateral effects attributable to the behavior of the post-merger firm should be developed. Both the examination of the issue and the ALJ’s opinion will be informed by the findings developed with respect to Issues 1-5.

50. Issue 7: *Conditions of Entry*. The ALJ shall receive testimony, studies, and other relevant economic evidence concerning the conditions of entry into the relevant product and geographic markets in the Charlottesville metro. A merger is unlikely to create or enhance market power, or facilitate its exercise, if entry into the radio market is sufficiently easy such that market participants, following the merger, could not profitably maintain an increase in the price of the relevant product following the merger. In general, the development of the record addressing conditions of entry in the Charlottesville metro should follow our analytical framework and the *Merger Guidelines*. Thus, evidence concerning the timeliness, likelihood, and sufficiency of entry in the Charlottesville metro are essential to reaching a judgment with respect to the efficacy of market entry as a way to offset potential adverse competitive effects that may be identified in the record pursuant to Issue 6. In the alternative, parties may stipulate that entry is so difficult such that it is unreasonable to view it as a factor that may have significant effect as an offset to any increase in market power resulting from the merger.

51. Issue 8: *Efficiencies*. The ALJ shall receive testimony, studies, and other relevant economic evidence with respect to possible efficiencies that the merger may produce. In general, the record on efficiencies must show that such efficiencies are both merger-specific and cognizable as indicated in our analytical framework and the *Merger Guidelines*.

52. Issue 9: *Public Interest Benefits*. The ALJ shall receive testimony, studies, and other relevant evidence that documents public interest benefits that the instant merger will provide listeners and advertisers in the Charlottesville metro. Such public interest benefits shall be in addition to efficiencies, if any, documented in the record pursuant to Issue 8 and must be benefits that would not otherwise be realized but for the instant merger. To count as a public interest benefit, efficiencies must be shown to “flow through” in a measurable way to listeners or advertisers or both. Public interest benefits other than efficiencies may include improvements in the quality, scope, and quantity of community-responsive programming; improved community service; and other commitments to strengthen programming and advertising services that support our long-standing policy of localism in broadcasting. The record on this issue should be of sufficient scope and specificity to enable the ALJ to reach a judgment whether the public interest benefits specific to the merger are sufficiently certain to result from the merger and quantitatively and qualitatively substantial enough to offset the adverse effects, if any, of the merger on competition in the Charlottesville metro.

VII. ORDERING CLAUSES

53. Accordingly, IT IS ORDERED, That, to defer further consideration of the application to assign the license of Station WUMX(FM), Charlottesville, Virginia from Air Virginia to Clear Channel in accordance with the interim policy, Air Virginia and Clear Channel SHALL FILE a joint election to defer consideration of the application. Such election SHALL BE FILED within 15 days of the Order becoming effective.

54. IT IS FURTHER ORDERED, That, in the event the parties do not timely file the joint election set forth in the paragraph above, pursuant to Section 309(e) of the Communications Act, the application to assign the license of station WUMX(FM), Charlottesville, Virginia from Air Virginia Inc. to Clear Channel Radio Licenses, Inc. IS DESIGNATED FOR HEARING at a time and place to be specified in a subsequent Order, on the following issue:

55. To determine, in light of the evidence to be presented in the hearing, whether the public interest, convenience and necessity would be served by the grant of the above-captioned assignment application (File No. BALH-20000403/ABI).

56. IT IS FURTHER ORDERED, That pursuant to Section 309(e) of the Communications Act, the burden of proof with the introduction of evidence and the burden of proof with respect to the issue specified in this Order shall be upon Air Virginia and Clear Channel, the applicant parties in this proceeding.

57. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order SHALL BE SERVED on the counsel of record appearing on behalf of the Chief, Enforcement Bureau. Parties may inquire as to the identity of such counsel by calling the Investigations and Hearing Division of the Enforcement Bureau at (202) 418-1420. Such service SHALL BE ADDRESSED to the named counsel of record, Investigations and Hearing Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, Room 3-B431, Washington, D.C. 20554.

58. IT IS FURTHER ORDERED, That the effectiveness of this Order IS STAYED for a period of 20 days from the date of its release, during the first 10 days of which the parties may amend their application or file such other information with the Mass Media Bureau as they deem relevant to ameliorate the competitive concerns identified in this Order.

59. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, Air Virginia and Clear Channel, pursuant to Sections 1.221(c) and 1.221(e) of the Commission's Rules, in person or by their respective attorneys, SHALL FILE in triplicate, A WRITTEN APPEARANCE, stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Such written appearance shall be filed within 20 days of this Order becoming effective pursuant to Paragraph 59 above. Pursuant to Section 1.221(c) of the Commission's rules, if the parties fail to file an appearance within the specified time period, the assignment application will be dismissed with prejudice for failure to prosecute.

60. IT IS FURTHER ORDERED, That Eure Communications, Inc. is made a party to the proceeding pursuant to Section 1.221(d) of the Commission's rules. To avail itself of the opportunity to be heard, Eure Communications, Inc., pursuant to Sections 1.221(e) of the Commission's rules, in person or by its attorneys, SHALL FILE in triplicate, A WRITTEN APPEARANCE, stating its intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Such written appearance shall be filed within 20 days of this Order becoming effective pursuant to Paragraph 59 above. If Eure Communications, Inc., fails to file an appearance within the time specified, it shall, unless good cause for such failure is shown, forfeit its hearing rights.

61. IT IS FURTHER ORDERED, That the applicant, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's rules, SHALL GIVE NOTICE of the hearing within the time and in the manner prescribed, and SHALL ADVISE the Commission of the publication of such notice as required by Section 73.3594(g) of the Commission's rules.

62. IT IS FURTHER ORDERED that, the application to assign the licenses for station WUMX(FM), Charlottesville, VA from Air Virginia, Inc. to Clear Channel Radio Licenses, Inc. WILL BE HELD IN ABEYANCE PENDING THE OUTCOME OF THIS PROCEEDING.

63. IT IS FURTHER ORDERED, That the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND copies of this Order to all parties by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Application of Gowdy FM 95, Inc. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KCGY(FM), Laramie, WY, and Application of Gowdy Family LP and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KOWB(AM), Laramie, WY;

Applications of Golden Triangle Radio, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WKOR(FM), Columbus, MS, WMXU(FM) and WSSO(AM) Starkville, MS, and Application of Charisma Broadcasting Co. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WKOR(AM) Starkville, MS, and Application of Bravo Communications, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WSMS(FM), Artesia, MS, and Applications of Radio Columbus, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WJWF(AM) and WMBC(FM), Columbus, MS;

Applications of Great Scott Broadcasting and Nassau Broadcasting II, L.L.C. For Consent to the Assignment of the Licenses of WCHR(AM), Trenton, NJ and WNJO(FM), Trenton, NJ;

Applications of Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the Licenses of WMLF(AM), Columbus, GA, WVRK(FM), Columbus, GA, WGSY(FM), Phenix City AL, WPNX(AM), Phenix City AL, WAGH(FM), Ft. Mitchell, AL, and WBFA(FM), Smiths, AL; and

Application of Air Virginia and Clear Channel Radio Licenses, Inc. For Consent to the Assignment of the License of WUMX(FM), Charlottesville, VA.

Today, we act on five of the oldest and most difficult radio assignment cases pending before us. Guided by the Communications Act, Commission precedent, and the Interim Policy we adopted in the Local Radio Ownership NPRM, we find in four of these cases that the license assignments are consistent with the public interest, and therefore we grant the applications. Relying on this guidance in our review of the license assignment in Charlottesville, Virginia, however, we cannot find based on the record before us that the license assignment is consistent with the public interest. Therefore, as required by the Communications Act, we designate that application for hearing.

Each of the five cases we decide today present difficult policy issues that arise from the increasing levels of concentration that have occurred in the radio market since 1996, when Congress significantly relaxed the limits on ownership of radio stations in a local market. A genuine concern about increased levels of concentration led the Commission to start “flagging” certain cases. Despite the Commission’s attempts, this ad hoc process too often led to inconsistent decision-making and delays in processing applications. To remedy this problem, and “to undertake a comprehensive examination of our rules and policies concerning local radio

ownership,” we adopted the *Local Radio Ownership NPRM*.⁴⁴ This proceeding will address difficult questions which to date have remained unresolved.

We recognized, however, that a final decision in the Local Radio Ownership proceeding would take time, and that too many radio assignment cases have been pending for too long. Accordingly, we established an Interim Policy, to provide greater transparency to the review process and to “guide our actions on radio assignment and transfer of control applications pending a decision in this proceeding.”⁴⁵ Under this policy, in addition to examining whether the proposed assignment complies with the Communications Act and the Commission’s rules, we conduct a competitive analysis of the proposed transaction and examine the potential impact of concentration in advertising markets. Our public interest analysis does not stop there, however. Unlike antitrust agencies, which focus solely on whether the effect of a proposed merger “may be substantially to lessen competition,”⁴⁶ the Commission must examine other factors. Indeed, the Communications Act compels us to consider the broad aims of “ensuring the existence of an efficient, nationwide radio communications service”⁴⁷ and promoting locally oriented service and diversity in media voices.

In short, the Communications Act does not permit the Commission to turn a deaf ear to radio listeners. Thus, while our competitive analysis is informed by antitrust principles, our ultimate obligation is to consider the potential benefits and harms of the transaction on the listening public. Where we find evidence that a proposed transaction will benefit listeners, we must weigh that factor against the potential harm to advertisers in determining whether the transaction is consistent with the public interest. We must also examine whether particular or unique circumstances of a market might mitigate the potential harm from such high levels of concentration. But where we cannot find an overall benefit to listeners or mitigating factors, we have no basis on which to conclude that the transaction will serve the public interest. In those cases, we must designate the application for hearing.

As stated, in four of the cases before us, the Commission found that, on balance and for different reasons, grant of the applications served the public interest. In Trenton, for example, we found that the “in market” stations capture only 36.7% of the Trenton audience, while the remaining 63.3% listen to “out of market stations.” Moreover, thirty “out of market stations” have enough Trenton listeners to meet BIA reporting data. We also found that, through its operation of WNJO (under an LMA agreement), the applicant has considerably improved the station’s performance through improved local news, weather and information.

⁴⁴ See, *Rules and Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 FCC Rcd 19861 (2001).

⁴⁵ *Id.* at 19894 (¶ 84).

⁴⁶ 15 U.S.C. § 18.

⁴⁷ 47 U.S.C. § 151.

In Cheyenne the record showed that the relevant geographic market is not the Cheyenne Arbitron metro because among other things, one of the tallest mountains in the area significantly limits the reach of the radio station signals of the assignor and assignee into each other's service areas. Thus, we concluded that the stations do not today, nor will they in the future, compete for advertising. In Columbus, Georgia, we found that significant format and radio advertising competition from three large radio station groups, one new entrant, and one out-of-market radio station would continue to exist after the transaction. Finally, in Columbus-Starkville, Mississippi, we found that the potential for competitive harm was outweighed by the significant public interest benefits to listeners, including greater access to locally generated radio programming.

In Charlottesville, however, no public interest benefits or mitigating circumstances were presented that would outweigh the high level of concentration that the proposed transaction would produce. Indeed, on the record before us, the only significant evidence presented was that the transaction would create a market in which the top two owners would have a combined 94.2% market share. This level of concentration, in the absence of any countervailing considerations or public interest benefits, is simply too significant for us to conclude that, on balance, the transaction is consistent with the public interest. Accordingly, in this case, we designate, as we must, the assignment application for hearing to determine whether grant would serve the public interest, convenience and necessity.

**SEPARATE STATEMENT OF
COMMISSIONER KATHLEEN ABERNATHY**

Re: Application of Gowdy FM 95, Inc and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KCGY(FM), Laramie, WY, and Application of Gowdy Family LP and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KOWB(AM), Laramie, WY;

Applications of Golden Triangle Radio, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WKOR(FM), Columbus, MS, WMXU(FM) and WSSO(AM) Starkville, MS, and Application of Charisma Broadcasting Co. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WKOR(AM) Starkville, MS, and Application of Bravo Communications, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WSMS(FM), Artesia, MS, and Applications of Radio Columbus, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WJWF(AM) and WMBC(FM), Columbus, MS;

Applications of Great Scott Broadcasting and Nassau Broadcasting II, L.L.C. For Consent to the Assignment of the Licenses of WCHR(AM), Trenton, NJ and WNJO(FM), Trenton, NJ;

Applications of Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the Licenses of WMLF(AM), Columbus, GA, WVRK(FM), Columbus, GA, WGSY(FM), Phenix City AL, WPNX(AM), Phenix City AL, WAGH(FM), Ft. Mitchell, AL, and WBFA(FM), Smiths, AL; and

Application of Air Virginia and Clear Channel Radio Licenses, Inc. For Consent to the Assignment of the License of WUMX(FM), Charlottesville, VA.

I support today's decisions granting four of the five oldest pending radio merger applications and setting one for hearing. I recognize that these cases have raised particularly difficult issues, but that is not a reason for failing to resolve them in a timely manner. I am pleased that, by today's decisions, we are finally able to provide answers to the applicants – some of whom have been waiting for years. Regardless of the outcome, the Commission owes it to consumers and the industry to provide prompt and clear answers to regulatory questions. I look forward to working with my colleagues to resolve the other pending radio applications and the outstanding Notice of Proposed Rulemaking.

**STATEMENT OF COMMISSIONER MICHAEL J. COPPS
ON RADIO TRANSFER APPLICATIONS**

*In the Matter of Golden Triangle Radio, Inc., Charisma Broadcasting Co.,
Bravo Communications, Inc., Radio Columbus and Cumulus Licensing Corp.
(Columbus, MS)*

*In the Matter of Solar Broadcasting Company,
Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses Inc.
(Columbus, GA)*

*In the Matter of Great Scott Broadcasting and Nassau Broadcasting
(Trenton, NJ)*

*In the Matter of Air Virginia, Inc. and Clear Channel Radio Licenses, Inc.
(Charlottesville, VA)*

*In the Matter of Gowdy FM 95 and Gowdy Family LP and Clear Channel Broadcasting
Licenses, Inc.
(Laramie, WY)*

I have struggled to find the public interest in the grant of these transfers. Given the levels of market concentration – both of advertising and audience share – that will result from these transactions, I can support the grant of only one of the five transfers at issue here. That one transaction arises in a unique geographic circumstance, in which the potential harm to competition was not significant and was outweighed by the benefits of the transaction. In the other four cases, however, I find evidence of significant anticompetitive effects. I could not support grant of these transfers absent additional information on the public interest benefits. I support the decision of the Commission to send one of these five transfers to hearing, and would have sent another three to hearing as well.

I am troubled by the trend toward greater and greater consolidation of the media as exemplified by these transactions. I am further troubled by the Commission's acceptance of these

levels of concentration in radio, particularly in the smaller radio markets at issue here. The five transactions before us here would each result in levels of concentration that are greater than that approved by the Commission in the past, and are potentially harmful to competition. Given the small markets at issue here, the effects of extreme concentration are that much more pernicious.

Each transaction presents slightly different issues regarding the acceptable levels of concentration in a market, the definition of a local radio market, or the attribution of local marketing agreements for the purposes of competitive analysis. The one transaction I am able to support, albeit hesitantly, involves the transfer of the Gowdy stations in Laramie, Wyoming to Clear Channel Broadcasting, Inc. While I am tremendously concerned about the unprecedented levels of market domination Clear Channel has achieved in radio markets throughout the country – including in Cheyenne, Wyoming – the transaction before the Commission does not appear to increase Clear Channel's dominance in this market. Due to the unique topography of the area, the Laramie stations deliver marginal signals into Cheyenne. This geographic anomaly permits the substitution of separate geographic markets for Cheyenne and Laramie, in lieu of the presumptive Arbitron market definition, thus I support the transfer of these licenses from the Gowdy licensees to Clear Channel.

Speaking generally, however, these transactions, taken together with the dozens of transactions approved by the Bureau last year, result in the Commission's adoption of an unacceptable standard for concentration in local radio markets. The amount of concentration in the markets at issue here is potentially very harmful to competition, to the listening public and to America's deeply held values of localism and diversity.

As I have often stated, Congress directed us to look to the public interest as we review transactions. Congress told the Commission that it may grant a broadcast license transfer only if "the public interest, convenience and necessity will be served thereby."⁴⁸ Competition is, and always has been, an essential part of the public interest, and I believe that a competitive analysis is an important part of the public interest in a particular transaction.⁴⁹

⁴⁸ 47 U.S.C. § 310(d).

⁴⁹ See, e.g., *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94 (1953) ("There can be no doubt that competition is a relevant factor in weighing the public interest."); *Mansfield Journal Co. v. FCC*, 180 F.2d 28, 33 (D.C. Cir. 1950) ("Monopoly in the mass communications of news and advertising is contrary to the public interest, even if not in terms proscribed by the antitrust laws."); *Rogers Radio Communications Services, Inc. v. FCC*, 593 F.2d 1225, 1230 (D.C. Cir. 1978) (The "effect on competition [is] clearly a proper factor for the Commission to consider under the public interest, convenience and necessity standard. . .").

I don't think that my faith in competition is particularly radical. In fact, it is a cardinal principle underlying the 1996 Act. In these relatively small radio markets, the anticompetitive effects of such high levels of concentration are likely to be especially pronounced. When one or two owners wield this much power in a particular market, they can make it impossible for independent stations to survive or even compete.

When it comes to transfers of broadcast licenses, our analysis must go beyond competitive analysis, to the effects of the transfer on factors unique to broadcasting – localism and diversity. This is consistent with Commission precedent, in which we have found that we have “an independent obligation to consider whether...radio ownership that complies with the local ownership limits would otherwise have an adverse competitive effect in a particular radio market and thus, would be inconsistent with the public interest.”⁵⁰

Neither is this a radical position. As a market-based democratic society, we value independent voices in the media. For a robust marketplace of ideas to survive, *each community* must have a diversity of sources of information available to its members – not just a *variety* of formats, but *diversity* of formats and of ownership. As consolidation of market power makes it harder and harder for independent stations to compete, local markets lose the diversity so essential to the free exchange of ideas in their community.

No single factor necessarily defines whether a particular transaction is in the public interest. Nevertheless, when harm to competition is likely to result from the grant of an application, it behooves the Commission to assure itself with as much certainty as is possible, that despite the harm to competition, each transaction will nonetheless serve the public interest, convenience and necessity. In order to make this determination where such high concentration levels will result, without clear evidence of strong public interest benefits, as in four of the cases before us today and discussed below, I am convinced that we must further examine the issues at a hearing.

⁵⁰ *CHET-5 Broadcasting L.P.*, 14 FCC Rcd 13041, 13043 (1999).

**SEPARATE STATEMENT
OF COMMISSIONER KEVIN J. MARTIN**

Re: Application of Gowdy FM 95, Inc and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KCGY(FM), Laramie, WY, and Application of Gowdy Family LP and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the License of KOWB(AM), Laramie, WY;

Applications of Golden Triangle Radio, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WKOR(FM), Columbus, MS, WMXU(FM) and WSSO(AM) Starkville, MS, and Application of Charisma Broadcasting Co. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WKOR(AM) Starkville, MS, and Application of Bravo Communications, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the License of WSMS(FM), Artesia, MS, and Applications of Radio Columbus, Inc. and Cumulus Licensing Corp. For Consent to the Assignment of the Licenses of WJWF(AM) and WMBC(FM), Columbus, MS;

Applications of Great Scott Broadcasting and Nassau Broadcasting II, L.L.C. For Consent to the Assignment of the Licenses of WCHR(AM), Trenton, NJ and WNJO(FM), Trenton, NJ;

Applications of Cumulus Licensing Corp. and Clear Channel Broadcasting Licenses, Inc. For Consent to the Assignment of the Licenses of WMLF(AM), Columbus, GA, WVRK(FM), Columbus, GA, WGSY(FM), Phenix City AL, WPNX(AM), Phenix City AL, WAGH(FM), Ft. Mitchell, AL, and WBFA(FM), Smiths, AL; and

Application of Air Virginia and Clear Channel Radio Licenses, Inc. For Consent to the Assignment of the License of WUMX(FM), Charlottesville, VA.

I – as well as everyone at the Commission – am concerned about the increasing levels of concentration of radio station ownership that has taken place during the last five years.

Last November, the Commission issued a NPRM undertaking a comprehensive review of how the Commission should assess radio license transfer applications. At that time, I expressed my dismay at the length of time many of these applications had been pending at the Commission. I am heartened that today, we are ruling on the five oldest applications (all pending for over 16 months).

All of the pending transfer applications comply with the structural ownership limits created by Congress in §202(b) of the 1996 Telecommunications Act. I continue to believe such structural limits should make our review of proposed mergers easier, not more complicated. I thus expressed my reluctance last November in agreeing to an interim policy that continued – and expanded upon – the practice of flagging particular transfers for a more detailed analysis,

when they would be below the statutory ownership limit. Nevertheless, I voted for the NPRM because it fairly raised the issue of what our policy should be with respect to assessing radio transfers, and it included timing deadlines that would ensure timely action on the pending applications. Today's actions on the oldest applications are a direct result of those deadlines. I am extremely pleased that we finally are providing the parties with resolution.

Each of the applications listed above was subjected to a comprehensive competitive analysis as set forth in the interim guidelines. I agree with the majority of my colleagues that the factors weigh against granting Clear Channel's acquisition of Air Virginia's radio license in Charlottesville, VA. Based on the record before us, I am unable to conclude that this transfer would serve the public interest. I therefore vote to set this application for hearing.